FILED
JAN 18 1985
ALEXANDER L. STEVAS,

No. 84-959

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF INDIANA,

Petitioner,

vs.

JOHN H. MOORE, JR.,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF INDIANA

# RESPONDENT JOHN H. MOORE, JR.'S BRIEF IN OPPOSITION

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I.

## QUESTIONS PRESENTED

Whether the statements made to an in-custody juvenile defendant, who has been advised of his rights and has invoked his right to counsel, that the police cannot question him further and that he should tell the truth and get this thing right because it's serious business and lies can hurt you, and he should think about it and contact the police, constitutes "interrogation" and would be proscribed by the Court's holding in Edwards v. Arizona.

Whether this juvenile defendant knowingly made an intelligent waiver of his right to counsel and his right to silence under the totality of the circumstances which include the fact that the police, rather than the accused, initiated and reopened the dialogue after a request for counsel was made.

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II.

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Respondent, John H. Moore, Jr., respectfully requests the Court to deny the State of Indiana's Petition for Writ of Certiorari directed to the Supreme Court of Indiana and, thereby, to let stand the decision entered by that court in cause number 1182S433 on September 5, 1984.

III.

## STATEMENTS OF JURISDICTION AND APPLICABLE CONSTITUTIONAL PROVISIONS

Pursuant to Rule 34(2) of this Court, Respondent John H. Moore, Jr. accepts the statements of jurisdiction and the applicable constitutional provisions recited in the State of Indiana's petition.

IV.

## STATEMENT OF THE CASE

John H. Moore, Jr. accepts the State of Indiana's statement of the case with the following qualifications.

Cab driver Arthur Jordan was hit on the head with a flashlight and he was cut when he touched his attacker's knife. He was treated as an emergency room patient and released.

The relevant facts occurred during a forty-five minute interval between the time John Moore requested an attorney, and Detective Trathen turned off his tape recorder, and the time when the recorder was turned on and a second statement taken.

During this period Detective Trathen spent the first five to ten minutes advising John Moore what was going to happen. (A-1) Trathen denies interrogating John Moore during this interval, but he admits telling John Moore he should tell the truth and get this thing right. He told John Moore this was serious business and if the young man wanted to get it right, he would have to call Trathen who couldn't ask him any more questions. (A-3). Trathen said " . . . it's always good to tell the truth, and I tell people when I interview them that they should tell the truth -- that the truth won't hurt you, but the lies certainly would."

John Moore testified that after he requested a lawyer, Detective Trathen told him he would drop charges of attempted murder and vehicle theft if he cooperated with him. (B-1). Trathen denies making such an offer.

After Trathen spoke with John Moore for the first five or

ten minutes of this forty-five minute period, Moore told the officer he was involved in the robbery but he had no part in cutting the cab driver.

Detective Trathen then left the room and consulted with some fellow officers about what to do. He then returned and recorded John Moore's confession.

V.

SUMMARY OF REASONS FOR DENYING THE WRIT

After sixteen year old John Moore voluntarily appeared at the police station, he was processed and placed in an interrogation room. John Moore asked for an attorney. His request was met with a five or ten minute lecture about telling the truth, getting it right, the need to call the police and an admonishment that lies can hurt you. These statements by Detective Trathen constituted interrogation and were prohibited by this Court's ruling in Edwards v. Arizona 451 U.S. 477 (1981).

The five or ten minute discourse by Detective Trathen was either express questioning or its functional equivalent. Taking into account the tender years of John Moore and his youthful sensitivity to coercion, Detective Trathen should have known his statements would elicit a possible incriminating response.

After the request for counsel, the conversation which led to John Moore's confession was initiated by Detective Trathen. Even assuming arguendo that Trathen's "tell the truth and get it right" speech does not constitute interrogation, there was no showing John Moore knowingly and voluntarily waived his right to counsel.

VI.

REASONS FOR DENYING THE WRIT

Sixteen year old John H. Moore, Jr. arrives at a police station with his parents in response to a telephone call by a detective. He is booked and placed in an interrogation room. A Detective Trathen enters the room and reads the young man his

rights. In the middle of the reading the detective stops and states the juvenile is under arrest for robbery. The officer leaves the room for twenty minutes and then returns to finish the Miranda warning and turn on a tape recorder. The boy refuses to give a statement and asks to speak with his lawyer.

At this point in time Detective Trathen should have refrained from further interrogating this teenager. Trathen turned off his tape recorder, but he did not stop talking. He continued talking for five or ten minutes. He told the impressionable lad that this was "serious business" and he should think about it. He stated John Moore should tell the truth and lies can hurt you. The detective said if Moore wanted to get this thing right, he would have to come to him and meet with him. The detective presented John Moore with his card, and at the end of this scenario the boy broke down and said he was involved in the crime but he didn't cut the taxi driver. This is what happened according to Detective Trathen. Johh Moore testified Trathen offered to drop some of the charges if he would tell the truth.

The detective's insistence the prisoner get it right, tell the truth, think about it and call him, constituted interrogation within the context of Rhode Island v. Innis 446 U.S. 291 (1980). This was express questioning or certainly its functional equivalent. The cold record does not reveal whether the officer's voice inflection was declaratory or inquisitive as he spoke these admonishments. Nor does it matter. Innis does not require a grammarian's question mark behind every custodial statement:

> "We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the

> fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response."
>
> (446 U.S. at 301).

Unlike Innis, this is not a case where two police officers are having a casual conversation between themselves about the location of a deadly weapon posing a danger to handicapped children, which is followed by an adult suspect's unsolicited confession. John Moore is a juvenile who has been processed as a criminal and trapped within an interrogation room. When focusing on his perceptions, we cannot ignore his tender years. A hardened ex-convict may have ignored repeated requests to get it right and tell the truth about this serious business, while a mere boy cracks upon the application of this subtle pressure. The test is subjective. The emphasis is on what John Moore perceived, not what Detective Trathen intended him to perceive. Yet when you consider what the detective could have done under these circumstances, it is clear he should have known his provocatory statements would have elicited an incriminating response.

He could have told John Moore to call his attorney. He could have sent John on to a jail cell and terminated the interview with a simple good bye. Upon John's exit, he could have addressed the parents about the gravity of the situation. Instead the officer confronted this youngster head-on by telling him he was in deep trouble and he should call him and straighten out the situation because lies can hurt you while the truth cannot. Detective Trathen's true intentions aside, his comments stimulated a response that was obviously foreseeable and predictable under these circumstances.

Although it was subtle, there is no doubt John Moore was interrogated after he exercised his right to consult his attorney. This conclusion is buttressed by the fact that after John asked for counsel, the next exchange which led to the incrimination was initiated by the police. Edwards v. Arizona 451 U.S. 486, at 484-485 (1981) stresses the significance of who initiates the admission:

> "Second, although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and resond to interrogation, see North Carolina v. Butler, supra, 441 U.S., at 372-376, 99 S.Ct., at 1757-1759, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

John Moore did not initiate further conversation after exercising his right to counsel. Detective Trathen elicited the exchange. Ignoring for a moment the content of the communication and whether or not it constituted "interrogation", who initiates the discussion is an important variable in determining whether a valid waiver of the right to be silent and obtain counsel occurred.

Assuming arguendo the Court rejects John Moore's contention Detective Trathen's statements constituted interrogation, the State of Indiana must nonetheless show that under a totality of the circumstances the Respondent made a knowing and intelligent waiver of his constitutional rights. Oregon v. Bradshaw ___ U.S. ___, 103 S.Ct. 2830 (1983). Again the determination of who initiated the conversation is very important. To establish a waiver, there should be a showing the suspect initiated the dialogue with the authorities:

> "We think the Oregon Court of Appeals misapprehended the test laid down in Edwards. We did not there hold that the initiation of a conversation by a defendant such as respondent would amount to a waiver of a previously invoked right to counsel; we held that after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place 'unless the accused himself initiates further communication, exchanges, or conversations with the police.' 451 U.S. at 485, 101 S.Ct., at 1885. This was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in Edwards was. We recently restated the requirement in Wyrick v. Fields, ___ U.S. ___, ___, 103 S.Ct., 394, 395, 74 L.Ed.2d 214 (1982) (per curiam), to be that before a suspect in custody can be subject to further interrogation after he requests an attorney there must be a showing that the 'suspect himself initiates dialogue with the authorities.'"
>
> Oregon v. Bradshaw 103 S.Ct. at 2834.

The determination of whether or not John Moore made a valid waiver of his right to counsel depends upon the particular facts and circumstances surrounding the case. The background, experience, and conduct of the suspect are important considerations. North Carolina v. Butler, 441 U.S. 369 at 374-375, (1979). Again, the age of John Moore is a critical factor. He was too young to understand the implications of the situation. He asks for counsel, and after five or ten minutes of lecture on the importance of telling the truth, he blurts out a confession. This is no foundation on which to build a knowing and intelligent waiver of the valuable right to an attorney. Although the Indiana Supreme Court never formally reached this second step of the analysis, because the court ruled interrogation had occurred, the court indirectly refers to the fact there was no proof beyond a reasonable doubt John Moore voluntarily waived his right to counsel before confessing.

VII.

CONCLUSION

For the foregoing reasons, the Respondent urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

By: _____
Joseph M. Dietz
Attorney for Respondent

## APPENDIX A

This appendix consists of testimony from Detective Trathen given at the hearing on the motion to suppress. It includes the contents of the State of Indiana's Appendix C plus additional testimony which was omitted from the State's Appendix C.

A This is in between the two statements. I advised the Defendant that since he expressed a desire to have an attorney, that I could no longer question him. I advised him at that point that if he wanted to discuss this with me at any other time, that it would be up to him to contact me, that I could no longer question him. I advised him, and his parents were present, that this was a very serious matter, and if he wanted to get it right with me, that he should contact me. At that time he broke down stating, "I did it. I didn't cut the man."

Q When did you make this statement to him that you just related?

A I explained, it was after taking the first statement.

Q When after taking the first statement?

A Immediately following the first statement.

Q Alright, and, now you told us earlier that the second statement was about forty-five minutes later, and that you were only gone a portion of that time, correct?

A I said I may have left the room. I'm not sure how long it was.

Q Alright, but the second statement was forty-five minutes later, correct?

A Yes.

Q But you told us now that he broke down immediately, is that your testimony?

A I didn't say immediately. I said that I advised him of what was going to happen from that point on. That may have taken five minutes, it may have taken ten minutes, but then he did.

Q Well, did you tell him anything more than what you've told us today in Court?

A I immediately quit interrogating the Defendant that time. I advised him and his parents that if he wished to, wished to speak with me again, that it would be up to him to contact me. That I could no longer interrogate him or question him.

Q Okay. Is that all you said?

A That is it.

Q What did you do for the final four minutes and fifty-five seconds, because you just said it took about five minutes. What happened to the other four minutes and fifty-five seconds?

A You're being awful specific. What we did at that point, when he broke down and admitted his involvement in this crime, and he said he wanted to get it right and give me a statement, that's when I left the room to determine whether or not I should do so. Now, I don't know if that took five minutes or maybe fifteen minutes, but that's the time. I believe I attempted to contact Mr. Whittingham, who was the robbery co-ordinator (sic), to get his opinion as to how I should pursue this?

Q And were you able to do that?

A No, I was not. This was in the evening.

Q And, uh, then after this ten or fifteen minutes talking to Detective Christ and Detective Layton, you, what did you do then?

A Okay. Before the, after I decided I would go ahead and take the second statement, I interviewed him as to what would be on the tape, asked him what happened, tell him explain the robbery to me.

Q Was this recorded, excuse me, what this recorded?

A No, it was not.

Q Alright. Did, did you ask Mr. Moore to sign a separate rights waiver between the taking of, between, before the commencement of the second statement?

A No, because he had previously been advised of his rights.

Q Okay. So you were relying on the first rights waiver, correct?

A Well, I think that was sufficient.

Q Alright. And then you took an untaped statement from him? Correct?

A I interviewed him.

Q Alright. And that was not on tape, right?

A No, it was not.

Q Did you make any notes of that?

A Uh, I may have jotted some down. However, I believe I do not have them here, or I do, could be in my notebook. I don't believe that I do. I think, basically, the, uh, what he explained to me --

Q Well, now, before we get into --

A There were no notes.

Q Okay. Thank you. And then I think you said forty minutes later the second statement was made and that, that was then taped, is that right?

A At, uh, nineteen thirty-three hours I started the second tape.

(R. III, 318 to 321 at line 15; Direct Examination of Detective Trathen)

* * * * *

Q After the tape machine was turned off during your effort to obtain the first statement, you had a further conversation off tape with Mr. Moore, is that correct?

A That's correct.

Q Now, in the course of that conversation, it was your testimony earlier that Mr. Moore made a statement during that conversation to you regarding this incident.

A He did.

Q Could you explain when and under what circumstances in the course of that conversation that Mr. Moore's statement came about?

A Immediately after I shut the machine off during the first statement, I advised Ar--, uh, John Moore and his parents that at this point, I could no longer conduct the interview. I could no longer interrogate him about this crime; that if any time he wanted to speak with me or if he wanted to get this right with me, that he would have to come to me. I could no longer go to him to ask questions. I advised him, uh, that, I gave them cards with my phone number. I told him that he should think about it and let me know. At this time, John Moore broke down and said, "Man, I want to get it right". He says, "I was with Art. He cut the dude. I took some of the money, but I had nothing to do with hurting that man".

Q Did you ask Mr. Moore any question immediately before he made that statement?

A No, I did not.

(R. III 341 to 342 at line 9; Cross Examination of Detective Trathen)

* * * * *

Q Do you recall if you, recall about five minutes ago me asking you whether or not there's anything else significant that had happened, and you saying, "no"? Do you remember that? Just a few minutes ago, me asking you those questions?

A I remember asking me, asking me that question. You didn't ask me--

Q Thank you. Do you remember your answer? Do you remember your answer?

A Yes, I do.

Q Your answer was "no", wasn't it?

A Yes, I do.

Q Okay. Since that time, you told the Court about a statement, I guess before Defendant's Exhibit 2, is that correct?

A Apparently you didn't ask the question.

Q Ah, it's the -- I see. Now you said you wanted Mr. Moore to get it right. Would tell the Court what you meant by "get it right with you"?

A That's just a term that, to get his story correct, to tell the truth.

Q To get it -- I see. To get it right.

A To tell the truth.

Q To tell the truth. You told him, you, you told him that he had to tell you the truth. That he ought to tell you the truth, right?

A I told --

Q Correct?

A No, my words were, Counselor, that if he wanted to get it right, tell the truth, that he would have to contact me.

Q I see. Now let me show you Defendant's Exhibit 2, and I'd like you to read the final question and answer.

A I read it a few minutes ago, but I'll read it again.

Q Okay. Tell me what is ambiguous about that question and answer.

A I don't understand what you mean, sir.

Q Well, he, you asked him, "Do you want a lawyer now", and he said, "Yes". Did he not?

A That's correct.

Q You testified on cross examination you felt that was ambiguous. Tell about what you felt in that question and answer was ambiguous.

A I didn't say that this question -- what I'm -- my statement is this, I am not so sure that he was not confused. Perhaps he was. I'm stating this, that the second statement was given after he was offered an opportunity to have an attorney present. I followed what I believed to be the law by stopping when I did.

Q When, when was he offered an opportunity to have an attorney present?

A I asked him before the second taping, as I have testified to.

Q Is that on tape?

A There is, it's on tape in the second statement when I asked his parents if this was with his own free will and permission.

Q Well, is it on tape that you ask his --

A Not that -- no.

Q Thank you. Now, you said Moore, you told Moore if he wanted to get this right with me, what did you mean by, "if you wanted to get it right with me"?

A I believe I answered that question. Get it right means to tell the truth.

Q You just wanted to tell you the truth?

A That's correct.

Q Okay. Did you, did you explain to Mr. Moore that, that by telling you the truth, something good would happen?

A I, I don't believe I -- I didn't promise him anything if that's what you're driving at. I, it's always good to tell the truth, and I tell people when I interview them that they should tell the truth. That the truth won't hurt you, but the lies certainly would.

Q And did you tell Mr. Moore that?

A I may have.

Q Thank you.

(R. III, 346 to 349 at line 9; Redirect Examination of Detective Trathen)

## APPENDIX B

This appendix consists of the direct examination of John Moore conducted at the hearing on his motion to suppress.

Q What is your name, please?

A John H. Moore, Jr.

Q And, Mr. Moore, how old are you?

A Sixteen.

Q Now, at the time you were arrested, what crimes were you told you were under arrest for?

A Armed Robbery, Attempted Murder, and Vehicle Theft.

Q Three charges, is that correct?

A Yes.

Q Now, after you requested a lawyer, did Detective Trathen indicate to you that anything would happen if those, if you were, if you got right with him, if you told him the truth.

A Yes.

Q What did he tell you?

A He said he would drop the Attempted Murder and the Vehicle Theft if I co-operated (sic) with him.

(R. III, 351, lines 13-27 and 352, lines 1-3; Direct Examination of John Moore)

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PROOF OF SERVICE

Under penalties for perjury, I do solemnly swear that I have served three (3) copies of Respondent John H. Moore, Jr.'s Brief in Opposition this 11th day of January, 1985 via United States First Class Mail, postage prepaid, upon Petitioner's counsel, Linley E. Pearson, William E. Daily and Michael Gene Worden, Office of the Attorney General, 219 State House, Indianapolis, Indiana, 46204.

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STATE OF INDIANA )
) SS:
COUNTY OF MARION )

SUBSCRIBED AND SWORN to before me, a Notary Public in and for said County and State, this 11th day of January, 1985.

Carol S. Foust
Carol S. Foust, Notary Public

My Commission Expires:
October 20, 1986

My County of Residence is:
Hendricks